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No. 98-1452

IN THE
Supreme Court of the United States

JOSEPH AMATEL, *et al.*,
Petitioners,

v.

JANET RENO, Attorney General of the United States, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the D.C. Circuit

PETITIONERS' REPLY MEMORANDUM

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The brief in opposition submitted by the United States confirms the need for plenary review. The United States does not dispute that the legal question presented — the standard by which every constitutional challenge brought in the prison context is to be measured — is of critical importance. Nor does the government make any meaningful attempt to grapple with the majority's decision. It instead attempts to avoid that decision, failing even to acknowledge that the majority expressly equated the *Turner* test with the same rational basis review that applies to economic regulations. Because the majority's decision irreconcilably conflicts with the interpretation of *Turner* adopted by several circuits, and effectively precludes prisoner from vindicating their

constitutional rights — including First Amendment speech and religious rights — it should be accepted for review.

1. In its Opposition, the government utterly fails to address the majority's equation of *Turner* with mere rational basis review. The government asserts that it is petitioners' contention that the majority's decision "subjects prison regulations to 'mere rational basis review,'" Opp. at 12, but asserts that, instead, the majority below "relied on exactly the standard that this Court enunciated in *Turner* and *Thornburgh*. . . ." Opp. at 13. But that argument is squarely foreclosed by the majority's own statement:

> Prison jurisprudence is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is. But the similarity between *Safley's* phrasing and the language of *rational basis review* suggests to us that, as far as the means-end fit is concerned, *Safley's standard is, if not identical, something very similar.*

Pet. App. 14a (*citing Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)) (emphasis added).

2. The government's failure to even acknowledge the majority's *express* reduction of *Turner* to mere rational basis review is telling. The reason it fails to do so is clear: the majority's reduction of *Turner* to rational basis review creates a direct split of authority between the D.C. Circuit and other circuits. In response, the government argues that because the D.C. Circuit "is the first and only court of appeals to address the constitutionality of the Ensign Amendment," Opp. at 8 there is "no conflict among the court of appeals" on that precise question. Opp. at 13. That is certainly true, but it is a non

sequitur. It says nothing about the conflict that the decision creates over the substantive *standard* that courts are to apply in evaluating a prisoner's constitutional claim under *Turner*. There is clearly a split over that broader question.

In response to *that* conflict, the government asserts a hodge-podge of reasons that, it claims, distinguish the cases cited in the petition from the majority's decision. Its attempt is unavailing. First, the government asserts that although evidence may be required when a regulation that directly impacts constitutional rights is promulgated by prison personnel, no evidence is required when the same regulation is promulgated by Congress. Opp. at 13-14. As an initial matter, the majority below did not rely on that distinction but instead found that the *Turner* test — which applies to the review of *all* constitutional challenges in the prison context — requires no showing of a reasonable nexus between the challenged regulation and the rationale the government relies upon to defend that regulation. *See, e.g.*, Pet. App. 23a.

More fundamentally, however, even if it must be presumed that Congress enacts a statute for a legitimate purpose, that does not mean that the statute is utterly free from judicial scrutiny.[1/] At a minimum, the government must

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1/ Although the government claims that the rationale articulated here is not post hoc, it cites only the isolated comments of Representative Ensign. *See, e.g.*, Opp. at 3 (citing Representative Ensign's statement that prisons are a "rehabilitative environment"). These descriptive statements do not demonstrate that even Representative Ensign believed there was a specific problem Congress needed to address. Indeed, at best, Representative Ensign appeared to believe that "cutting prisoners off from their sexually explicit magazines will certainly do no harm." 142 Cong. Rec. 18,883 (1996). Even if Representative Ensign's statement could be interpreted as his belief that banning all adult material furthers some undefined

demonstrate that there is a sufficient degree of fit between its purpose and its action to withstand review. *See, e.g., Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must *demonstrate* that the recited harms are real, not conjectural, and that the regulation will in fact alleviate these harms in a material way.") (emphasis added, internal citation omitted). Thus, even if the government's interest underlying a regulation is assumed to be valid, the government must make *some* showing that the regulation furthers that interest.

This Court's decision in *Turner v. Abbott* makes clear that this principle applies when courts review regulations that impact constitutional rights in prisons. In *Turner* the Court assumed that the prison system's interest in security was genuine and legitimate. That, however, did not end the inquiry. Instead, the Court scrutinized the regulation and found that, given the record before it, the government had not *demonstrated* that the regulations sufficiently furthered the government's asserted purpose to allow the regulation to be sustained. *Turner* at 97-99.

The government next claims that even if some courts of appeals have interpreted *Turner* as requiring evidence to be presented, these courts, "use the term 'evidence' somewhat

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rehabilitative purpose, that isolated remark alone cannot serve to demonstrate Congressional intent. And it is undisputed that prior to passage of the Ensign Amendment, Congress held no hearings, received no evidence, issued no committee reports, and made no finding that material featuring nudity harmed rehabilitation in any way.

loosely," Opp. at 14, and that by "evidence" the courts mean merely an articulated rationale or "common sense." *Id.* But these courts have plainly required something more than a mere assertion of purpose. *See, e.g., Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) (holding that in the face of a constitutional challenge to a prison regulation, the government "must first identify the specific penological interest involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interest. *An evidentiary showing is required as to each point.*") (emphasis added).

Moreover, even where courts have accepted the government's assertion as to purpose, they have required that the government demonstrate that the purpose is, in fact, furthered by the regulation. In *Shimer v. Washington*, for example, as the government notes, the regulations and the affidavit submitted by the prison warden in support of the regulations did not indicate the purpose behind the regulations. Opp. at 15. But in *Shimer*, as in this case, the government did assert that the regulations furthered a legitimate interest. There, the interest asserted to support the ban on guards' writing recommendation letters to parole boards was guarding against corruption and coercion. No party contested that these were legitimate purposes. But the *Shimer* court found no plausible connection between the regulation and the state's asserted interest because there was no *evidence* that, in fact, there was a reasonable nexus between the interest asserted and the ban. "In order to make [the] inquiry" required by *Turner*, the court found, "[t]he prison administration must proffer some evidence to support its restriction. . . ." *Shimer v. Washington*, 100 F.3d 506, 509 (7th Cir. 1996). Absent such a demonstration, the regulation must fall because "*[e]vidence* to suggest this connection should be at the heart of the *Turner*

analysis." *Id.* at 510 (emphasis added); *accord Walker v. Sumner*, *supra*. Similarly, in *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th cir. 1995), the court did not challenge the legitimacy of the government's interest in security. Instead, it struck down the regulation because "defendants were unable to provide any evidence the restrictions on contact were reasonably related to prison security."

The conflict between these decisions and the decision below could not be clearer. The decisions cited in the petition uniformly require the government to submit some evidence in support of the challenged restriction. The majority's decision below stands in sharp and irreconcilable conflict:

> Plaintiffs argue that if we are unpersuaded by the district court's analysis we should remand the case to allow them to introduce evidence supporting their position. But that suggestion misconceives the legal issue under *Safley*. *The question is not whether the curtailment of pictorial smut will advance the prisons' rehabilitation project, but whether Congress could reasonably have believed it would do so.*

Pet. App. at 23a (emphasis added). The majority thus clearly, and unequivocally, found not only that evidence was not required, but that it was irrelevant. Even if plaintiffs had been allowed to show that there was not a reasonable nexus between the ban and the government's interest, the majority indicated that it would have upheld the ban as long as Congress might have *believed* it was furthering its stated purpose. As the Seventh Circuit found in striking down a regulation that was defended, not upon evidence but, as here, with "conjecture," "[t]he potential infringement of the free-speech clause of the

First Amendment is too plain to warrant comment." *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

This is not to say that courts do not diverge on the degree and nature of the evidence that the government must present in defending a prison statute or regulation against constitutional challenge. They do. That does not demonstrate that there is no conflict among the circuits on the proper application of the *Turner* test, however. To the contrary, it confirms that the need for clarification of the *Turner* test is acute.

3. Nothing in the government's opposition seriously suggests otherwise. Indeed, the government's opposition appears to rest largely on the suggestion that the Ensign Amendment was properly upheld (even if the correct standard was not applied) because the Amendment is a mere extension of the prior regulations which were upheld by this Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Opp. 2-5. As an initial matter, that is incorrect. The regulations upheld in *Thornburgh* were different in ways that the *Thornburgh* Court found critically important. Those regulations did not impose a blanket ban, but instead required wardens to make individual determinations about the impact that a given piece of material would have on the security, good order or discipline within the prison. Only material specifically found by the warden or his designee to pose a threat within the prison could be banned. *See Thornburgh*, 490 U.S. at 416 ("[W]e are comforted by the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination that it is 'detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity.'"). And the regulations expressly forbade

banning material solely based on its content.[2/] Critically, the *Thornburgh* court recognized that any individual prohibition would be invalid if it was not reasonably related to the government's interest in security, good order or discipline. *See Thornburgh*, 490 U.S. at 419. The Court thus remanded to the district court to make the requisite inquiry about whether a sufficient nexus between the any given exclusion and the government's asserted interest had been met. *Id.*[3/]

In any event, whether or not the Ensign Amendment would have been upheld if the majority below applied the standard *Turner* requires is not the question presented by petitioners. The question presented is the purely legal question of whether the standard articulated by the majority for judging constitutional challenges to prison regulations is the correct standard.[4/] The majority below found that the test equates to mere rational basis review. That reduction of the *Turner* standard — which effectively eviscerates the ability of prisoners to maintain constitutional challenges to prison regulations — stands in sharp conflict with the decisions of

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2/ Indeed, because the regulations listed the type of material that might meet the standard, the *Thornburgh* case found the validity of the regulation a "closer" question than prior regulations had presented. *Thornburgh*, 490 U.S. at 415.

3/ In discussing the pre-Ensign Amendment regulations, the government simply ignores that, had there been a legitimate concern with rehabilitation, the Bureau of Prisons could simply have amended its regulations to include a prohibition on material that individual wardens found harmed rehabilitation.

4/ Because the standard articulated by the panel is now the law of the circuit, the answer to that question affects not only the validity of the Ensign Amendment, but will affect all constitutional challenges to prison regulations brought in that circuit.

several circuits, and with this Court's decisions in *Turner* and *Thornburgh*. For that reason, the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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